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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL ANTHONY PELLICER, Appellant.	2 CA-CR 2009-0163 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20084501

Honorable Hector E. Campoy, Judge

AFFIRMED

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 After a jury trial, appellant Michael Pellicer was convicted of kidnapping, two counts of aggravated assault causing temporary but substantial disfigurement or impairment, and two counts of aggravated assault with a deadly weapon. The jury found

each offense was dangerous pursuant to A.R.S. § 13-604[1] based on Pellicer's use of a knife. The jury also found he was on probation at the time of these offenses.

¶2 Viewed in the light most favorable to affirming his convictions and sentences, *see State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008), the evidence shows that, on November 3, 2008, after arguing with his girlfriend, C., Pellicer stabbed her in the arm with a knife and struck her several times in the head with the knife's handle. He then ordered C. into the bedroom, locked the bedroom door, and refused to let her leave for at least an hour.

¶3 The trial court sentenced Pellicer to concurrent, enhanced, and aggravated prison terms for each count, the longest of which was twenty years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing she had "reviewed the entire record and was unable to find any meritorious issues to raise on appeal." Pellicer has filed a supplemental brief raising several issues.[2] We affirm.

¶4 Pellicer first asserts the five-count indictment was "duplicitous and multiplicitous." An indictment is duplicitous if it charges more than one offense in a

[1]Significant portions of the Arizona criminal sentencing code have been renumbered effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. Unless otherwise stated, we refer to the versions in effect at the time Pellicer committed the offenses.

[2]Pellicer raised none of the issues in the trial court that he now raises on appeal. Accordingly, he has waived all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

single count. *See State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985); *see also* Ariz. R. Crim. P. 13.3(a). In contrast, a multiplicitous indictment charges a single offense in more than one count. *See Via*, 146 Ariz. at 116, 704 P.2d at 246. A defendant must challenge a defect in a charging document by motion filed before trial. *See* Ariz. R. Crim. P. 13.5(e) and 16.1(c). Pellicer did not do so and, therefore, has presumptively forfeited these issues on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) ("A defendant who fails to object at trial forfeits the right to obtain appellate relief.").

¶5 Typically, when a defendant does not raise an issue in the trial court, we will reverse only if the error is fundamental and the defendant demonstrates resulting prejudice. *Id.* ¶¶ 19-20. Our supreme court has suggested, however, that defects in a charging document are not subject to appellate review if a defendant failed to raise a timely objection below. *See State v. Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d 369, 378 (2005); *see also State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.3d 1177, 1178 (App. 2006).

¶6 Even assuming, arguendo, that fundamental error review is appropriate here, Pellicer is not entitled to relief. The indictment was neither duplicitous nor multiplicitous. Each of the five counts charged Pellicer with a distinct domestic violence offense: (1) aggravated assault with a deadly weapon or dangerous instrument, alleging he had cut C.'s arm, *see* A.R.S § 13-1204(A)(2); (2) aggravated assault causing temporary but substantial disfigurement based on the injuries to C.'s arm, *see* § 13-1204(A)(3); (3) aggravated assault with a deadly weapon or dangerous instrument alleging he had struck C. on her head, *see* § 13-1204(A)(2); (4) aggravated assault

causing temporary but substantial disfigurement or impairment based on C.'s head injuries, *see* § 13-1204(A)(3); and (5) kidnapping, *see* A.R.S. § 13-1304. That each of the offenses involved the use of a knife and arguably stemmed from the same course of conduct does not render the indictment defective, despite Pellicer's argument to the contrary. And, to the extent he argues he was sentenced improperly in violation of A.R.S. § 13-116, that statute permits a single act "made punishable in different ways by different sections of the laws" to be punished under those different sections as long as any sentences imposed are concurrent, as are Pellicer's sentences.

¶7 Pellicer next asserts insufficient evidence supported his conviction because C. had not identified several bloodstained knives admitted into evidence as the knives he used when assaulting her and, further, because the state presented no evidence the blood on the knives was hers or his fingerprints were on the knives. But C. testified Pellicer had used a knife to cut her and strike her on the head. She also testified she had hidden in a trash can, where police officers later found a bloodstained knife, the knife Pellicer had used to stab her. Thus, the jury readily could conclude Pellicer had used that knife to assault her.

¶8 Pellicer also argues the state had not presented sufficient foundation for admitting the knives in evidence, again because the state had neither analyzed the blood found on them nor determined whether his fingerprints were on the knives. But, to lay a proper foundation for their admission, the state had only to show they were the same knives found at the scene. *See State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984) (officers' testimony that exhibits "were the items [they] had confiscated at the

scene of the crime" sufficient foundation); Ariz. R. Evid. 901(a) (authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims"). The state established that foundation, and nothing further was required.

¶9 Pellicer additionally argues the trial court erred by admitting the knives into evidence contrary to Rule 403, Ariz. R. Evid. We disagree. Relevant evidence is inadmissible under Rule 403 only "if its probative value is substantially outweighed by the danger of unfair prejudice." This weighing is best left to the trial court, and we will not disturb its decision on appeal absent an abuse of discretion. *State v. Fernane*, 185 Ariz. 222, 225, 914 P.2d 1314, 1317 (App. 1995). The bloodstained knives obviously were strong evidence Pellicer had assaulted C. with a knife. And, although the evidence certainly was detrimental to Pellicer, it did not "ha[ve] an undue tendency to suggest [a] decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997); *cf. Onujiogu v. United States*, 817 F.2d 3, 6 (1st Cir. 1987) (all evidence against defendant meant to be prejudicial; Rule 403, Fed. R. Evid., designed to prevent only unfair prejudice). Thus, the court did not abuse its discretion in admitting the knives into evidence.

¶10 For much the same reason, we reject Pellicer's suggestion the trial court violated Rule 403 by admitting photographs of C.'s injuries. In order to prove two of the charged counts of aggravated assault, the state was required to show Pellicer temporarily but substantially had disfigured or impaired C. *See* § 13-1204(A)(3). Photographs of her injuries clearly were relevant to prove that element. The state is not "compelled to try its

case in a sterile setting." *State v. Chapple*, 135 Ariz. 281, 289-90, 660 P.2d 1208, 1216-17 (1983). Nor were the photographs so gruesome or shocking as to suggest the jury made its decision on an improper basis. *See Mott*, 187 Ariz. at 545, 931 P.2d at 1055.

¶11 Pellicer next argues the trial court erred in failing sua sponte to order a competency hearing pursuant to Rule 11, Ariz. R. Crim. P., asserting the court was aware he was "a medical mental patient" at the time of trial. A defendant is not competent to stand trial if, "as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense." Ariz. R. Crim. P. 11.1. If a trial court "has reasonable grounds to question a defendant's competency to stand trial," it may order a competency examination pursuant to Rule 11.2. *State v. Sutton*, 27 Ariz. App. 231, 234, 553 P.2d 1216, 1219 (1976).

¶12 Pellicer contends the trial court was aware he might not have been competent to stand trial. He points both to evidence that, after locking C. in the bedroom, he had threatened suicide, as well as to his counsel's statements at sentencing that Pellicer has "huge anger issues" when he is not on medication, although he had been on medication throughout trial. But these facts in no way suggest Pellicer would have had difficulty understanding the proceedings or assisting in his defense. *See* Ariz. R. Crim. P. 11.1. Accordingly, the court did not err by not ordering a competency evaluation.

¶13 Pellicer also contends one of the trial court's preliminary jury instructions was improper. During preliminary instructions, the court instructed the jury as to the state's burden of proof and then mistakenly stated, "If the State does not meet this burden of proof, you must find the defendant guilty." This is, as Pellicer argues, obviously an

incorrect statement of the law. But the court cured the error during final jury instructions, when it instructed the jury that it must presume the defendant is innocent, that the state must prove his guilt beyond a reasonable doubt, and that it should find Pellicer not guilty if the state failed to meet that burden. *See State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Additionally, the jury had the correct written instruction available to it during deliberations. We presume the jury followed these instructions, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), and see no reasonable possibility the jury could have been misled or prejudiced by the court's earlier inadvertent misstatement of the law.

¶14 During final instructions, the trial court also instructed the jury that the definition of a deadly weapon was "anything designed for lethal use" and that "[t]he term includes a knife." It later told the jury that this instruction was incorrect, stating the definition of a deadly weapon "may include a knife, but it doesn't necessarily include a knife" and "it's really for you to decide whether any given knife constitutes a deadly weapon." It then instructed the jury to "[j]ust run a line through" the improper portion of the printed instructions they had been given, stating the complete instruction should read only that a "[d]eadly weapon means anything designed for lethal use" and reiterating that "the rest of the language should not be part of the instruction."

¶15 Pellicer asserts the trial court's instructing the jury to strike a portion of the printed instructions constituted an improper comment on the evidence. *See* Ariz. Const. art. VI, § 27. We summarily reject this argument. In taking this action, the court expressed no opinion about what the evidence proved. *See State v. Roque*, 213 Ariz. 193,

¶ 66, 141 P.3d 368, 388 (2006) (trial court violates Arizona constitution by expressing opinion as to what evidence proves). Nor could the court's correction of an otherwise erroneous instruction reasonably be found to have "'interfere[d] with the jury's independent evaluation of th[e] evidence.'" *Id.*, *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). And, even if we agreed the court's initial instruction reasonably could be interpreted as a comment on the evidence, any risk of error plainly was cured when the court told the jury to disregard the defective portion of the instructions. Again, we presume the jury followed the court's directions to do so. *See Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d at 847.

¶16 After a trial to establish prior convictions, the court found Pellicer had three historical felony convictions, for aggravated assault with a deadly weapon in Pima County Superior Court cause number CR-20060492, animal cruelty in Yavapai County Superior Court cause number CR-20061433, and attempted possession of marijuana in Pima County Superior Court cause number CR-20013517. The court determined the previous conviction for aggravated assault was a dangerous offense, enhanced his sentences accordingly, and found each offense warranted an aggravated sentence. The sentences the court imposed fell within the prescribed statutory range. *See* A.R.S. §§ 13-1204(B); 13-1304(B); 13-604(G), (J); 2007 Ariz. Sess. Laws, ch. 248, § 1; 2007 Ariz. Sess. Laws, ch. 287, § 1. Pellicer asserts the trial court erred in classifying the prior conviction from Yavapai County as a felony conviction because he had been "discharged

from this cause/open ended felony, making it a misdemeanor."[3] It appears Pellicer refers to A.R.S. § 13-702(G), which permits a trial court, when a defendant has been convicted of certain class six felonies, to "enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly" or to "place the defendant on probation . . . and refrain from designating the offense as a felony or misdemeanor until the probation is terminated." *See* 2006 Ariz. Sess. Laws, ch. 148, § 1. The evidence presented at the prior convictions trial belies Pellicer's argument. The judgment evidencing this conviction states Pellicer had been convicted of "a Class 6 designated felony." Thus, the sentencing court in the Yavapai County case plainly did not "refrain from designating the offense as a felony" but, rather, explicitly designated the offense as such.

¶17 Last, Pellicer asserts the trial court erred "in using CR-20060492 as a dangerous prior aggravating factor" because that offense was "non-dangerous in nature, non-repetitive, and not classified or prosecuted under Domestic Violence Statu[t]es." Pellicer is correct that the sentencing minute entry in CR-20060492 classifies the offense, aggravated assault with a deadly weapon or dangerous instrument, as nondangerous. The court here nonetheless concluded this offense was a dangerous offense and that Pellicer therefore had one dangerous historical felony conviction.

¶18 The sentencing minute entry in CR-20060492 is admittedly perplexing. Aggravated assault with a deadly weapon or dangerous instrument is necessarily a

[3]In support of his position, Pellicer refers to a document attached to his supplemental brief. But, because that document was not before the trial court and was not made part of the record on appeal, we will not consider it.

dangerous offense as defined by § 13-604(P). But the sentencing court's designation of the offense as nondangerous, although relevant to Pellicer's sentence in that case, is not relevant here. The subsections of § 13-604 applicable here, subsections (G) and (J), do not require the prior offense to have been alleged and proved to be of a "dangerous nature" under § 13-604(P). They require only that the prior offense have involved "the use or exhibition of a deadly weapon or dangerous instrument." § 13-604(G), (J); *see State v. Leon*, 197 Ariz. 48, ¶¶ 6-8, 3 P.3d 968, 969-70 (App. 1999) (designation of prior offense as nondangerous irrelevant to determination whether it involved use or exhibition of deadly weapon or dangerous instrument under A.R.S. § 13-604.02). As Pellicer's prior conviction in CR-20060492 so determined as a matter of law, the court was permitted to sentence him pursuant to § 13-604(G) and (J).

¶19 We have reviewed the entire record for fundamental, reversible error and have found none. We therefore affirm Pellicer's convictions and sentences.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge